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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-5577

[Filed May 10, 2010]

ALTON T. TERRY, *Plaintiff-Appellant,* v. TYSON FARMS, INC., *Defendant-Appellee.*

Appeal from the United States District Court for the Eastern District of Tennessee at Winchester. No. 08-00003—Harry S. Mattice, Jr., District Judge.

Argued: March 4, 2009

Decided and Filed: May 10, 2010

Before: NORRIS, COOK, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Cynthia Noles Johnson, JOHNSON LAW, P.C., Cohutta, Georgia, for Appellant. Jay T. Jorgensen, SIDLEY AUSTIN LLP, Washington, D.C., for Appellee. Jonathan H. Levy, UNITED STATES DEPARTMENT OF JUSTICE, Washington, DC, for Amicus Curiae. **ON BRIEF:** Cynthia Noles Johnson, JOHNSON LAW, P.C., Cohutta, Georgia, Russell D. Hedges, MOORE & HEDGES, Tullahoma, Tennessee, for Appellant. Jay T. Jorgensen, Carter G. Phillips, SIDLEY AUSTIN LLP, Washington, D.C., Travis R. McDonough, Roger W. Dickson, Zachary H. Greene, MILLER & MARTIN PLLC, Chattanooga, Tennessee, for Appellee. Jonathan H. Levy, Michael S. Raab, UNITED STATES DEPARTMENT OF JUSTICE, Washington, DC, for Amicus Curiae.

OPINION

GRIFFIN, Circuit Judge. Plaintiff Alton T. Terry, a Tennessee poultry farmer, entered into a contract with defendant Tyson Farms, Inc., the nation's largest poultry processing firm, to raise chickens. The present action evolved from purportedly unlawful retaliatory actions taken by Tyson against Terry in response to his affiliation with, and leadership role in, a newly organized regional growers' association. Terry brought suit under the Agricultural Fair Practices Act of 1967 ("AFPA"), 7 U.S.C. § 2303, alleging unlawful interference and discrimination based on his membership in the growers' association; and the Packers and Stockyards Act ("PSA"), 7 U.S.C. §§ 192(a) and (b), alleging that Tyson engaged in unfair,

discriminatory or deceptive practices, and subjected him to undue or unreasonable prejudice or disadvantage.

Tyson moved to dismiss Terry's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion as to both claims and entered judgment in favor of Tyson. In doing so, the court determined that Terry failed to allege his involvement with an "association of producers," as defined and required by the AFPA, 7 U.S.C. § 2302(c) (2008). The district court also awarded Tyson attorney's fees incurred in defending against Terry's AFPA claim, pursuant to 7 U.S.C. § 2305(a). With respect to Terry's PSA claim, the district court held that proof of injury to competition is a necessary element of a claim under 7 U.S.C. §§ 192(a) and (b) and, because Terry failed to plead that Tyson's actions had an adverse effect on competition, this count likewise must be dismissed for failure to state a claim.

Terry now appeals the dismissal of his complaint and the district court's award of attorney's fees to Tyson. For the following reasons, we affirm.

I.

In our de novo review of the district court's grant of Tyson's motion to dismiss under Rule 12(b)(6), we construe Terry's complaint in the light most favorable to him and accept his well-pled factual allegations as true. *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008).

In 2001, Terry bought a poultry farm in Tennessee and entered into an agreement with Tyson, which

contracts with independent growers to raise broiler chickens owned and provided by the company. Tyson provides the chicks, feed, and technical advice; the responsibility of the grower is to raise the chickens to a target processing weight and then return the mature birds to Tyson. Tyson pays its growers according to a formula that measures the relative productivity of the growers by comparing the amount of feed provided and the weight of the chickens upon their return to the processing plant. Consequently, the weight of the chickens at the end of the grow-out period is an important factor in the compensation equation, and federal regulations provide that weighing is to occur immediately upon arrival at the processor's plant. *See* 9 C.F.R. § 201.82(b).[1] A grower is entitled to watch his birds being weighed. *See* 9 C.F.R. § 201.108-1(e)(4).[2] Tyson's alleged failure to promptly weigh Terry's chickens and allow Terry access to the weighing of his birds began the chain of events that culminated in this lawsuit.

Before he purchased the farm, Terry researched the poultry business, reviewed the seller's production records, and spoke with Tyson's production manager at

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[1] 9 C.F.R. § 201.82(b) provides: "Whenever live poultry is obtained under a poultry growing arrangement, the poultry shall be transported promptly after loading and the gross weight for grower payment purposes shall be determined immediately upon arrival at the processing plant, holding yard, or other scale normally used for such purpose."

[2] 9 C.F.R. § 201.108-1(e)(4) states in pertinent part: "Poultry growers . . . are entitled to observe the balancing, weighing, and recording procedures. A weigher shall not deny such persons that right or withhold from them any information pertaining to the weight."

its Shelbyville, Tennessee, complex about Tyson's intent to continue its placement of chickens at the farm following the sale. The production manager assured Terry that the farm and equipment were in excellent condition and that it was a top-producing farm. These assurances lead Terry to believe that the farm would need no substantial improvements in the near future. In the summer of 2001, Terry and his family moved to the farm, and he took over management of the poultry flock.

Terry thereafter became aware of numerous problems that poultry growers were experiencing with Tyson and other poultry processors. In 2002, Terry attended a conference in North Carolina with other contract growers, attorneys representing growers, and representatives of farmers' organizations. The purpose of the conference was to address the problems faced by growers in their dealings with processors and to provide guidelines for the organization of grower associations. After the conference, Terry became actively involved in organizing the poultry growers in his area into what ultimately became the Tennessee Poultry Growers Association ("TPGA"). In 2004, he was elected chairman of the directors for the TPGA. In his capacity as a TPGA officer, Terry educated poultry growers about their rights under federal law and reported complaints about Tyson to officials at the Packers and Stockyards Administration in Washington, D.C.

Meanwhile, Terry became concerned that his poultry was not being weighed promptly upon arrival at the Tyson plant, as required by his contract and federal regulations. In August and December of 2004, he went to Tyson's plant to watch his birds being

weighed, but he was denied access. He complained to a federal official and requested that a letter be sent to Tyson. On February 13, 2005, Terry followed a truck loaded with his poultry to Tyson's processing plant. When he arrived at the plant at 2:00 a.m., he was told that his chickens would not be weighed until after 4:00 a.m. When Terry returned at 4:00 a.m., he was once again denied access to the plant. Plaintiff called an agent with the Grain Inspection Division of the Packers and Stockyards Administration, who told Terry that he was in route to the plant and would find out why Terry was not allowed to observe the weighing of his poultry.

Later that same week, Terry met with Tyson's local managers. Following the meeting, Tyson delayed its placement of birds on Terry's farm for a full flock rotation, costing Terry $30,000 in lost compensation. When Terry met with Tyson's managers again on March 28, 2005, they informed him that Tyson made a "company decision" to discontinue the placement of birds at his farm after he made the weighing complaint. Terry asked for, but was refused, compensation for the damages he sustained as a result of the missed flock.

On January 11, 2006, Tyson notified Terry that his contract would not be renewed, allegedly because of his confrontational behavior toward Tyson's representatives and his failure to make "costly and unnecessary" changes to his poultry operation, despite the fact that Terry was a successful poultry producer and was "well above average" in the grower rankings. Terry avers that "[t]he reasons provided by Tyson for termination of [his] contract were false and pretextual to disguise Tyson's real reason, which was to thwart

[his] efforts to organize growers, and in retaliation for [his] complaints to the Packers [and] Stockyards Administration." Terry subsequently advertised his farm for sale, but claims that he has been unable to sell it due to Tyson's demands for costly upgrades as a condition to the continued placement of poultry at the farm. This lawsuit followed.

II.

"[T]o survive a motion to dismiss, the complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." *Tam Travel, Inc. v. Delta Airlines, Inc.*, 583 F.3d 896, 903 (6th Cir. 2009) (citation omitted). "We need not accept as true legal conclusions or unwarranted factual inferences, and conclusory allegations or legal conclusions masquerading as factual allegations will not suffice." *Id.* (citations and internal quotation marks omitted). "[T]he complaint's '[f]actual allegations must be enough to raise a right to relief above the speculative level,' and 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)).

The parties to this appeal do not dispute the factual specificity of Terry's allegations. Rather, at issue is whether Terry's complaint contains adequate "direct or inferential allegations respecting all material elements to sustain a recovery" under the AFPA and PSA. *Tam Travel, Inc.*, 583 F.3d at 903. With regard to the latter statute, however, we must first settle the question whether a showing of injury to competition is a necessary element of a claim under the PSA.

III.

This case poses a matter of first impression in this circuit: whether a plaintiff asserting unfair discriminatory practices or undue preference under §§ 202(a) and (b) of the PSA must allege an adverse effect on competition in order to state a claim. This issue is not novel to other courts; it has been addressed by seven of our sister circuits, with consonant results. All of these courts of appeals unanimously agree that an anticompetitive effect is necessary for an actionable claim under subsections (a) and (b). For the reasons that follow, we join this legion.

Section 202 of the PSA, codified at 7 U.S.C. § 192, provides:

> It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or

(c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any otherperson (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

> (g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.

7 U.S.C. § 192 (hereinafter "§ 192").

Terry alleges in Count Two of his complaint that "[d]efendant violated the [PSA] by engaging in unfair, unjustly discriminatory, or deceptive practices or devises [sic] in violation of § 202 of the [PSA], 7 U.S.C. § 192(a); and by subjecting Plaintiff to undue or unreasonable prejudice or disadvantage in violation of 7 U.S.C. § 192(b)." However, Tyson argued, and the district court agreed, that because the PSA is essentially an antitrust statute, subsections (a) and (b) require a party to allege an adverse effect on competition in order to sustain a cause of action. The district court dismissed Terry's PSA claim for failure to allege such anticompetitive activity on Tyson's part. In reaching this conclusion, the court noted the dearth of Sixth Circuit precedent on this issue and followed the prevailing tide of other circuit court decisions that have held that subsections (a) and (b) of § 192 require an anticompetitive effect.

The tide has now become a tidal wave, with the recent issuance of the Fifth Circuit Court of Appeals' en banc decision in *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc), in which that court joined the ranks of all other federal appellate courts that have addressed this precise issue when it held that "the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act." *Wheeler*, 591 F.3d at 357.

All told, seven circuits – the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits – have now weighed in on this issue, with unanimous results. *See Wheeler*, 591 F.3d 355; *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, Nos. 96-2542, 96-2631, 164 F.3d 625, 1998 WL 709324, at *4-5 (4th Cir. Oct. 5, 1998) (unpublished table decision); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *DeJong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1336-37 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980); and *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976).

In this appeal, Terry, joined by amicus curiae United States Department of Agriculture ("USDA"), seeks to persuade us to adopt the decidedly minority view embraced by some district courts and vigorously articulated by Judge Garza, along with six of his colleagues, in his dissenting opinion in *Wheeler*. *See Wheeler*, 591 F.3d at 371 (Garza, J., dissenting). *See also Schumacher v. Tyson Fresh Meats, Inc.*, 434 F. Supp. 2d 748, 754 (D.S.D. 2006) (holding that "§ 192(a)[] does not prohibit only those unfair and deceptive practices which adversely affect competition"); *Kinkaid v. John Morrell & Co.*, 321 F. Supp. 2d 1090, 1102 (N.D. Iowa 2004) ("[T]his court finds that only a strained reading of the statute could require that practices that are 'unfair' or 'deceptive'

within the meaning of § 192(a) must *also* be 'monopolistic' or 'anticompetitive' to be prohibited."); *Gerace v. Utica Veal Co., Inc.*, 580 F. Supp. 1465, 1469-70 (N.D.N.Y. 1984) (holding that it is unnecessary to allege restraint of trade or hindrance of competition under § 192(a)).

Ultimately, Terry and the USDA would have this court deviate from the course taken by the seven other circuits that have spoken on this issue, thus creating a conflict. We decline to do so. "[W]hile we recognize that we are not bound by the law of other Circuits, this court has also routinely looked to the majority position of other Circuits in resolving undecided issues of law. We also take note of the importance of maintaining harmony among the Circuits on issues of law." *Wong v. Partygaming Ltd.*, 589 F.3d 821, 827-28 (6th Cir. 2009) (citations omitted); *see also United States v. Washington*, 584 F.3d 693, 698 (6th Cir. 2009) ("[T]his court routinely looks to our sister circuits for guidance when we encounter a legal question that we have not previously passed upon."). As one court has explained, this is more than a courtesy:

> As a general matter, we do not create conflicts among the circuits without strong cause. We adhere to this view because federal law (unlike state law) is supposed to be unitary. It would, of course, be foolhardy to suggest that we should blindly adhere to another circuit court's decision as a fail-safe method of preventing intercircuit conflict. Congress has created multiple and co-equal intermediate federal appellate courts, each with an equal power and duty to decide the cases properly brought before it. This regime, by design, embraces the possibility of a considered

> difference in views among the circuit courts on a given question; a policy of blind adherence to the decision of another circuit, apart from any utility it might have in promoting uniformity and predictability in outcome, would flout the manifest will of Congress. As then-Judge Ginsburg had occasion to observe in *In re Korean Air Lines Disaster*, "each [federal court] has an obligation to engage independently in reasoned analysis." 829 F.2d 1171, 1176 (D.C. Cir. 1987), *aff'd*, 490 U.S. 122 [] (1989). At the same time, the interest that all prospective parties before the court have in uniformity and predictability of outcome must be given its due. We thus temper the independence of the analysis in which we engage by according great weight to the decisions of other circuits on the same question.

Washington Energy Co. v. United States, 94 F.3d 1557, 1561 (Fed. Cir. 1996).[3] Indeed, the *Wheeler* court was

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[3] *See also Admiral Fin. Corp. v. United States*, 378 F.3d 1336, 1340 (Fed. Cir. 2004) ("[W]e accord great weight to the decisions of our sister circuits when the same or similar issues come before us, and we do not create conflicts among the circuits without strong cause.") (internal quotation marks omitted); *Am. Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002) ("[A]lthough we are by no means compelled to follow the decisions of other circuits, there is virtue in uniformity of federal law as construed by the federal circuits.") (citation and internal quotation marks omitted); *United States v. Auginash*, 266 F.3d 781, 784 (8th Cir. 2001) ("Although we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus

sensitive to the vast body of cohesive precedent when it pointed out that "[p]redictability must be the lodestar." *Wheeler*, 591 F.3d at 363.

As the next in line to interpret § 192's requirements, we, too, assign great weight to the unanimity of thought that precedes our own determination of this issue. Needless to say, "[w]e are not merely to count noses." *United States v. Hill*, 48 F.3d 228, 232 (7th Cir. 1995).[4] However, the rationale employed by our sister circuits is well-reasoned and grounded on sound principles of statutory construction. Moreover, under the fundamental principle of stare decisis, we deem the construction of this nearly 90-year-old statute to be a matter of settled law. We therefore join these circuits and hold that in order to succeed on a claim under §§ 192(a) and (b) of the PSA, a plaintiff must show an adverse effect on competition.

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avoiding unnecessary burdens on the Supreme Court docket.") (internal quotations marks omitted); *Mayer v. Spanel Int'l Ltd.*, 51 F.3d 670, 675 (7th Cir. 1995) ("We do not create conflicts among the circuits without strong cause."); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 580 (2d Cir. 1991) ("Where there is the considerable weight of unanimous authority, we believe that creation of such a circuit conflict must be based on an abiding conviction that the view of several other courts is unreasonable, lest the Supreme Court's ability to resolve conflicts among the circuits be impaired by the sheer number of such conflicts.").

[4] "[W]e are not constrained to follow [the views of our sister circuits] if, in our opinion, they are based upon an incomplete or incorrect analysis." *Nixon v. Kent County*, 76 F.3d 1381, 1388 (6th Cir. 1996) (citation omitted).

In the present case, the district court properly determined that although Terry asserts a number of wrongful acts by Tyson, his complaint does not allege that Tyson's actions had an anticompetitive effect: "Plaintiff focuses solely on how Defendant's action harmed him as an individual grower. He makes no allegations regarding the effect of Defendant's actions on the pricing of poultry or on overall competition in the poultry industry." Accordingly, the district court did not err in granting Tyson's motion to dismiss Terry's PSA claim.

IV.

Congress enacted the AFPA in 1968 to "protect[] the right of farmers and other producers of agricultural commodities to join cooperative associations through which to market their products," and "to rectify a perceived imbalance in bargaining position between producers and processors of such products." *Mich. Canners and Freezers Ass'n, Inc. v. Agric. Mktg. and Bargaining Bd.*, 467 U.S. 461, 464 (1984) (footnotes omitted). "[T]he Act's principal purpose is to protect individual producers from interference by processors when deciding whether to belong to a producers' association . . . ." *Id.*; *see also Newark Gardens, Inc. v. Mich. Potato Indus. Comm'n*, 847 F.2d 1201, 1203 (6th Cir. 1988); 7 U.S.C. § 2301 ("Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law."). Consistent with these aims, the AFPA proscribes certain actions by processors, known as "handlers" under the Act:

> It shall be unlawful for any handler knowingly to engage or permit any employee or agent to engage in the following practices:
>
> > (a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association; or
> >
> > (b) To discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers[.]

7 U.S.C. §§ 2303(a) and (b).

In Count One of his complaint, Terry alleges that Tyson violated § 2303 by "knowingly permitting its employee or agent to coerce and intimidate Plaintiff in the exercise of his right to join and belong to an association of producers and by discriminating against Plaintiff with respect to the quantity and quality of poultry and feed supplied to Plaintiff because of his membership in an association of producers."

The parties do not dispute that Tyson is a "handler" and Terry is a "producer," as defined by the AFPA. *See* 7 U.S.C. §§ 2302(3)(A) and(4) (defining these respective terms). Rather, the dispositive issue is whether the association with which Terry was affiliated – the TPGA – satisfies the AFPA's definition

of an "association of producers," so as to bring his allegations of coercion and discrimination under the protective umbrella of the statute. During the time period relevant to this cause of action, the AFPA defined an "association of producers" as "any association of producers of agricultural products *engaged in marketing, bargaining, shipping, or processing as defined in section 1141j(a) of Title 12, or in section 291 of this title*." 7 U.S.C. § 2302(c) (emphasis added).[5]

Section 2302(c) of the AFPA cross-references two other statutes, the Agricultural Marketing Act of 1929 ("AMA") and the Capper-Volstead Act, which define similar farming associations. The AMA was enacted to promote the efficient production and distribution of agricultural commodities, in part, by permitting producers to organize "cooperative associations" to assist in bringing products to market. 12 U.S.C.

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[5] The recently enacted Food, Conservation, and Energy Act of 2008 expanded the definition of "association of producers" to include "an organization whose membership is exclusively limited to agricultural producers and dedicated to promoting the common interest and general welfare of producers of agricultural products." 7 U.S.C. § 2302(2)(B). *See* Pub. L. 110-234, § 11003(6)(B), and Pub. L. 110-246, § 11003(6)(B) (redesignating former subsection (c) of § 2302 as paragraph 2 and added subparagraphs (A) and (B)). The issue of retroactive application of this amendment, effective May 22, 2008, has not been raised by Terry on appeal and hence is forfeited. *See generally United States v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006) ("[A]n appellant abandons all issues not raised and argued in its initial brief on appeal.") (citation and quotation marks omitted); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 544 n.8 (6th Cir. 2002) ("It is well established that an issue not raised in a party's briefs on appeal may be deemed waived.").

§ 1141(a)(3); *see Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1042 (2d Cir. 1980) (observing that the declared policy of the AMA is "to promote the effective merchandising of agricultural commodities" through "a farm marketing system of producer-owned and producer-controlled cooperative associations."). The AMA defines the term "cooperative association" as

> any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services . . . .

12 U.S.C. § 1141j(a).

The Capper-Volstead Act "removed from the proscription of the antitrust laws cooperatives formed by certain agricultural producers that otherwise would be directly competing with each other in efforts to bring their goods to market." *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 822 (1978) (footnote omitted). It was passed by Congress in 1922 "to make it clear that the formation of an agricultural organization with capital would not result in a violation of the antitrust laws, and that the organization, without antitrust consequences, could perform certain functions in preparing produce for market." *Id.* at 824; *see also Newark Gardens, Inc.*, 847 F.2d at 1208 (noting that the Capper-Volstead Act "exempts agricultural cooperatives from the antitrust laws"). The Capper-Volstead Act includes within its scope agricultural producers who "act together in

associations . . . in collectively processing, preparing for market, handling, and marketing [farm products] in interstate and foreign commerce." 7 U.S.C. § 291. "The real sense behind such an association and the prime purpose of the persons so banding together is to accomplish a common objective – collective marketing. It is a collection of producers cooperating to sell the goods they have produced." *United States v. Elm Springs Farm, Inc.*, 38 F. Supp. 508, 511 (D. Mass. 1941); *see also Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1185 (8th Cir. 1982) ("The unmistakable purpose of the Capper-Volstead Act is to permit farmers and only farmers to band together and benefit economically from collective marketing of their products.").

In its motion to dismiss, Tyson argued that the TPGA does not qualify as an AFPA "association of producers" because Terry does not allege that the TPGA engaged in the requisite "marketing, bargaining, shipping, or processing" activities enumerated in § 2302(c); instead, Terry's complaint avers only that the TPGA gathered information, educated its members, and reported complaints about Tyson and other processors to the government – functions purportedly outside of the purview of the AFPA.

The district court examined Terry's complaint and, relying on the plain language of § 2302(c), agreed with Tyson that the TPGA does not fall within the statutory definition of an "association of producers":

> Interpreting § 2302(c), the United States Court of Appeals for the Sixth Circuit has held that a state-run potato commission was not an

"association of producers" because it did not engage in marketing, bargaining, shipping or processing of agricultural products. *Newark Gardens, Inc. v. Mich. Potato Indus. Comm'n*, 847 F.2d 1201, 1206 (6th Cir. 1988).

In his capacity as president of the TPGA, Plaintiff "gathered information from other growers about problems they were having with Tyson" and reported these complaints to government agencies. (Complaint, Court Doc. 1, ¶ 13.). Plaintiff also "educated other growers about federal laws prohibiting abuse of growers in the poultry industry." (*Id.* at ¶ 14.). Plaintiff distributed video tapes to other growers that reported on problems in the poultry industry. (*Id.* at ¶ 15.). From the allegations in Plaintiff's complaint, it appears that TPGA is principally involved with educating growers about their rights and assisting growers with enforcing their rights by reporting producers' violations to federal agencies.

Defendant argues that TPGA's "educational and informational efforts and, to the extent that they exist, its government complaints, do not qualify it as an 'association of producers'" under the AFPA. (Court Doc. 11 at 7.). The statutory language is clear that an "association of producers" includes only those organizations that engage in "marketing, bargaining, shipping or processing" of agricultural products. 7 U.S.C. § 2302(c). The Court must therefore evaluate whether the TPGA is involved with any of the specified activities.

"Marketing" is "the act of buying and selling in a market; the commercial functions involved in transferring goods from producer to consumer." *The American Heritage Dictionary of the English Language* 1072 (4th ed. 2000). No reasonable inference can be drawn from the allegations in the complaint that the TPGA engages in buying or selling of goods in a market or in the commercial functions involved with transferring goods from producer to consumer. The actions of the TPGA do not, therefore, qualify as marketing under § 2302.

"Shipping" is "the act or business of transporting goods." *Id.* at 1607. "Producing" is "to bring forth, yield; to manufacture; to cause to occur or exist; to make or yield products or a product." *Id.* at 1399. No reasonable inference can be drawn from the complaint that the TPGA is involved with shipping or producing agricultural goods under § 2302.

"Bargaining" is "to negotiate the terms of an agreement, as to sell or exchange; to engage in collective bargaining; to arrive at an agreement." *Id.* at 144. There is no allegation that TPGA negotiates on behalf of any of its members or, as discussed above, sells or exchanges agricultural goods. "Collective bargaining" is "negotiation between organized workers and their employer or employers to determine wages, hours, rules, and working conditions." *Id.* at 362. Although it appears that Plaintiff, in his role as president of TPGA, discussed issues such as working conditions and federal laws with other growers, there is no

> allegation that he ever discussed those issues with Defendant. Moreover, the relationship between Plaintiff and Defendant is not that of employer/employee but of two commercial organizations under contractual obligations to each other. There is no indication from the allegations in the complaint that TPGA had any interaction with Defendant and could not, therefore, have collectively bargained with Defendant. As such, there is no indication that TPGA engaged in "bargaining," collective or otherwise, with regard to agricultural products as required by § 2302.

The district court further determined that the TPGA's educational and enforcement activities did not otherwise fall within the cross-referenced definitions set forth in the AMA and Capper-Volstead Act, and observed that "[t]here is no apparent policy reason that the activities of the TPGA would be subject to antitrust laws and therefore no need to establish an exemption for such activities." Therefore, because a material element of Terry's AFPA claim was fatally lacking, the district court dismissed Terry's AFPA claim. We affirm the district court's sound decision.

Terry argues that in granting Tyson's motion to dismiss, the district court employed a pleading standard that is too exacting under *Twombly*. He contends that "[a] plausible reading of [his] [c]omplaint is that one of the purposes of [the TPGA] was to strengthen the marketing and bargaining position of the growers who were organizing to address common grievances and concerns in their relationship with Tyson" and, therefore, the TPGA qualifies as an "association of producers." According to Terry, the

district court's "narrow" construction of the AFPA is at odds with the remedial purpose of the statute, i.e., to prevent processors from using their superior bargaining position to the detriment of producers. Terry maintains that Tyson has effectively chilled the ability of its contract growers to form an association for their mutual benefit and increase their bargaining power, thereby defying the protective goals of the AFPA.

However, Terry's interpretation of the AFPA disregards the plain language of the statute, *see Thompson v. N. Am. Stainless*, 567 F.3d 804, 807 (6th Cir. 2009) (en banc), and the germane maxim *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of others"), *Millsaps v. Thompson*, 259 F.3d 535, 546 (6th Cir. 2001), that "justifies] the inference that [activities] not mentioned were excluded by deliberate choice, not inadvertence . . . ." *City of Cleveland v. Ohio*, 508 F.3d 827, 847 (6th Cir. 2007) (citation and internal quotation marks omitted). Terry's complaint does not allege that the TPGA engaged in any of the primary functions of an "association of producers" enumerated in the AFPA or related statutes. Moreover, Terry's stance is contradictory to our prior decision in *Newark Gardens*.

In *Newark Gardens*, the plaintiff, a Michigan potato-farming business, brought suit against the Michigan Potato Industry Commission, alleging that certain provisions of a Michigan statute that required potato producers to pay a promotional assessment to the commission was in conflict with and, thus, preempted by the AFPA. *Newark Gardens*, 847 F.2d at 1201. The plaintiff argued that it was being coerced into joining or belonging to an "association of

producers" in violation of § 2303(a) of the AFPA, or maintaining a "*marketing* contract with an association of producers" in violation of § 2303(c). *Id.* at 1207. The express purpose of the Potato Commission was to "foster, develop, and promote the potato industry through research, promotion, advertising, market expansion, development of new markets, education, and the development and dissemination of market and industry information." *Id.* at 1202 (quoting MICH. COMP. LAWS § 290.423(1)). We rejected the plaintiff's "expansive interpretation of the definition of 'association of producers,'" namely, its argument that because the Potato Commission supplied "market information," it therefore engaged in "marketing" under the AFPA:

> The district court concluded that [the] definitional sections [of the AFPA, AMA and Capper-Volstead Act] described traditional cooperatives among farmers and did not contemplate governmental commodity promotion boards such as the Potato Commission . . . . The district court found that the Potato Commission was not within "the cooperative association tradition" because it did not engage in collective bargaining on behalf of farmers, nor did it perform any act which involved the sale or transfer of title in potatoes from grower to shipper to retailer to consumer. Therefore, since the Commission did not fit within the definitions contained in 7 U.S.C. § 291 or 12 U.S.C. § 1141j(a), the court reasoned

> that it was not an "association of producers" within the meaning of the AFPA as defined in 7 U.S.C. § 2302(c). We agree.

Id. at 1208.

We therefore affirmed the district court's grant of summary judgment to the defendant. *Id.* at 1210. In so holding, we distinguished *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir. 1974), in which the Ninth Circuit Court of Appeals held that two potato-growers' associations engaged in "marketing" within the meaning of the Capper-Volstead Act and therefore were immune from antitrust prosecution. The Ninth Circuit broadly construed the term "marketing" and concluded that even though the associations "did not collectively process, prepare for market, handle or actually sell potatoes,"[6] their activities nonetheless constituted marketing because each association "negotiat[ed] contracts for the sale of potatoes by its members," which "necessarily require[d] supplying market information and performing other acts that are part of the aggregate of functions involved in the transferring of title to the potatoes." *Treasure Valley*, 497 F.2d at 215.

In *Newark Gardens*, we concluded that "[t]he collective bargaining activities of the associations which represented the farmers in *Treasure Valley* are clearly distinguishable from the activities of the Potato Commission . . . . These bargaining associations which negotiated with the processors on behalf of the farmers

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[6] These activities were carried out by the individual members.

were within the traditional definition of cooperative associations." *Newark Gardens*, 847 F.2d at 1209. By contrast, the Potato Commission "does not attempt to dictate the price, terms, or timing of the sale of potatoes in Michigan." *Id.* at 1206. "Potato producers are free to sell to whomever they choose at whatever price they negotiate." *Id.*[7]

As our decision in *Newark Gardens* makes clear, the term "association of producers" includes only those organizations that are directly involved with bringing farmers' products to market. The TPGA, according to Terry's well-pled allegations, simply does not fit this profile. Like the Potato Commission in *Newark Gardens*, the TPGA neither negotiates with poultry

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[7] This distinction drawn in *Newark Gardens* is equally applicable to other cases which have found that an association has engaged in "marketing" under the Capper-Volstead Act. *See, e.g., Fairdale Farms, Inc.*, 635 F.2d at 1040 (eschewing a "hyper-technical reading" of the Capper-Volstead Act in determining that cooperative associations organized for the sole purpose of fixing prices were engaged in marketing and therefore entitled to antitrust protection under the act); *Agritronics Corp. v. Nat'l Dairy Herd Ass'n, Inc.*, 914 F. Supp. 814, 825 (N.D.N.Y. 1996) ("In the case at bar, the Complaint by its own terms states that defendants are in the business of 'testing milk and providing the "official" milk production records for dairy farmers.' As such, each defendant [association] clearly has demonstrated that it is performing a 'marketing' function within the meaning of the . . . Capper-Volstead Act[]."); *N. Cal. Supermarkets, Inc. v. Cent. Cal. Lettuce Producers Coop.*, 413 F. Supp. 984, 991-92 (N.D. Cal. 1976) (citing *Treasure Valley* and holding that activities of lettuce producers' cooperative association fell within protective scope of Capper-Volstead Act because, even though the cooperative did not grow, ship, sell, or negotiate the sale of products in its own name, it set prices, supplied market information, and performed other acts related to the transfer of title of the products).

processors nor "perform[s] any act which involve[s] the sale or transfer of title in [poultry] from grower to shipper to retailer to consumer." *Id.* at 1208. Nothing in Terry's complaint suggests that the TPGA is primarily engaged in one or more of the AFPA's designated activities, i.e., "marketing, bargaining, shipping or processing" its members' agricultural products. 7 U.S.C. § 2302(c). *Cf. I.C.C. v. Jamestown Farmers Union Federated Coop. Transp. Ass'n*, 57 F. Supp. 749, 753 (D. Minn. 1944), *aff'd* 151 F.2d 403 (8th Cir. 1945) ("[I]f the cooperative is predominantly engaged in one or more of the activities specified in the [AMA], . . . such association does not lose its fundamental character as a cooperative" by engaging in other activities incidental to the primary statutory activity.). Rather, it is an organization principally involved with educating growers about their rights and assisting growers in the enforcement of those rights by reporting processors' violations to federal authorities. The fact that the TPGA's educational and policing activities may have the incidental benefit of increasing the growers' bargaining power, as Terry posits, does not bring it within the AFPA's definition of "association of producers," because, as *Newark Gardens* demonstrates, such an association must *itself* bargain or market on behalf of its members.

Terry has failed to allege that Tyson's unlawful actions stem from his involvement with an AFPA-protected "association of producers." Consequently, his complaint is deficient, in that it does not "contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." *Tam Travel, Inc.*, 583 F.3d at 903 (citation omitted). We therefore affirm the district court's dismissal of his AFPA claim pursuant to Rule

12(b)(6). *Cf. Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 637 (10th Cir. 1998), *abrogated on other grounds by Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) ("The prohibition on the making of 'false reports' [under § 2303(e) of the AFPA] . . . appl[ies] only to false reports about associations of producers or handlers which are intended to influence or that have the effect of influencing a producer's decision to join an association. Because plaintiffs' complaint made no allegation concerning membership in such an association, we affirm the district court's dismissal of plaintiffs' AFPA claim for failure to state a claim.").

V.

Next, Terry appeals the district court's award of attorney's fees to Tyson for its legal costs incurred in defending against Terry's AFPA claim. The AFPA's fee-shifting provision states that "[i]n any action commenced pursuant hereto, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs." 7 U.S.C. § 2305(a). Terry maintains that we should apply the standard set forth in *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978), in which the Supreme Court, in the context of a Title VII civil rights case, held that a prevailing defendant should be awarded attorney's fees only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation," so as not to discourage civil rights plaintiffs or "undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Christiansburg Garment Co.*, 434 U.S. at 421-22. *See also Garner v. Cuyahoga County Juvenile Court*, 554 F.3d 624, 635-36 (6th Cir. 2009) (applying

Christiansburg standard to a claim under 42 U.S.C. § 1988). Terry asserts that "[a]n award of fees to a prevailing defendant under a lesser standard than that established by *Christiansburg* would deter producers such as Terry from acting to enforce their rights under the AFPA, thus defeating the very purpose of the Act – to prevent processors from chilling producers from joining together with other growers."

However, Terry failed to raise this issue in a timely manner for the district court's consideration; hence, it is not properly preserved for our review. *See Foster v. Barilow*, 6 F.3d 405, 407-08 (6th Cir. 1993) (holding that issue regarding whether attorney's fees could be awarded to prevailing defendants in an action under the Fair Housing Act, without a determination that the claim was frivolous, groundless, or unreasonable, was forfeited on appeal because it was not raised in the district court); *see also Smoot v. United Transp. Union*, 246 F.3d 633, 648 (6th Cir. 2001) (declining to consider the plaintiff's appellate challenge to award of attorney's fees where the plaintiff failed to raise an objection in the district court); *Moore v. Int'l Bhd. of Elec. Workers, Local 58*, 60 F. App'x 581, 582 (6th Cir. 2003) (unpublished) (affirming district court's judgment in favor of defendants where the plaintiff "failed to timely respond to the defendants' motion for attorneys' fees in the district court, [and thus] waived any objection he had to the defendants' application for and the district court's award of attorneys' fees").

Moreover, there is no reason to deviate from the general forfeiture rule in this case. When faced with an identical unpreserved challenge to an award of attorney's fees to the prevailing defendants in *Foster*, we declined to apply the "narrow" exceptions to the

forfeiture rule because "the issue was not developed with sufficient clarity and completeness in the district court" and "a ruling in favor of the [plaintiffs] would require further litigation in the district court on the frivolousness issue," thereby prolonging the litigation. *Foster*, 6 F.3d at 407-08 (internal quotation marks omitted).

We decline to address Terry's argument under these similar circumstances, where a remand to the district court for further development of the record on the question of bad faith would be necessary.

Terry offers no other reasons why the district court abused its discretion in awarding attorney's fees to Tyson, as the prevailing party, under § 2305(a). In fact, our review of the record indicates that both the magistrate judge, to whom the matter was referred, and the district court thoroughly evaluated Tyson's counsel's billing records, required itemization of AFPA-related fees and a local attorney's affidavit attesting to the reasonableness of the charged hourly rate,[8] and then evaluated the requested fees using the accepted "lodestar" calculation method. *See generally B & G Mining, Inc. v. Dir., Office of Workers' Comp. Programs*, 522 F.3d 657, 661-63 (6th Cir. 2008); *Moore v. Freeman*, 355 F.3d 558, 565-66 (6th Cir. 2004); *Paschal v. Flagstar Bank, FSB*, 297 F.3d 431, 434-35 (6th Cir. 2002); and *Reed v. Rhodes*, 179 F.3d 453, 471-

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[8] Tyson's proffered attorney's fees incurred in defending against both the AFPA and PSA claims totaled $57,455.00. Tyson asserted that $27,461.00, or 47.8% of the total, was for fees incurred in defending the AFPA claim. The district court adopted the magistrate judge's report and recommendation advising that Tyson should be awarded its requested amount of AFPA fees.

73 (6th Cir. 1999). We therefore will not disturb the award.

VI.

For the reasons stated, we affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-5577

[Filed May 10, 2010]

ALTON T. TERRY, Plaintiff - Appellant,	)
v.	)
TYSON FARMS, INC., Defendant - Appellee.	)

Before: NORRIS, COOK, and GRIFFIN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Tennessee at Winchester.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at WINCHESTER

Case No. 4:08-cv-3
Judge Mattice

[Filed April 9, 2008]

ALTON T. TERRY,	)
	)
Plaintiff,	)
	)
v.	)
	)
TYSON FARMS, INC.,	)
	)
Defendant.	)
	)

MEMORANDUM AND ORDER

This is an action in which Plaintiff seeks damages against Defendant for alleged violations of the Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2301 *et seq*., and the Packers and Stockyards Act, 7 U.S.C. § 181 *et seq*. Before the Court is Defendant Tyson Farms, Inc.'s Motion to Dismiss [Court Doc. 10] for failure to state a claim up on which relief can be granted. For the reasons stated below, Defendant's Motion to Dismiss is **GRANTED.**

I. STANDARD

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint that fails to state a claim upon which relief can be granted. The purpose of Rule 12(b)(6) is to permit a defendant to test whether, as a matter of law, the plaintiff is entitled to relief even if everything alleged in the complaint is true. *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). To survive a motion to dismiss under 12(b)(6), plaintiff's "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Assoc. of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir. 2007) (citing *Bell Atlantic v. Twombly*, 127 S.Ct. 1955, 1974 (2007)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The Court must determine not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support his claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In making this determination, the Court must construe the complaint in the light most favorable to plaintiff and accept as true all well-pleaded factual allegations. *Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999). The Court need not accept as true mere legal conclusions or unwarranted factual inferences. *Id.*

II. FACTS

Taking all well-pled facts as true and construing the complaint in the light most favorable to the Plaintiff, the facts are as follows.

Plaintiff Alton T. Terry became interested in purchasing a poultry farm in 2000. ((Complaint, Court Doc. 1, ¶ 5.) As part of his research prior to purchasing a farm, Plaintiff contacted Mike Brown, an agent of Defendant Tyson Farms, Inc. ("Tyson"), about one of their current producers. (*Id.* ¶ 6.) Brown informed Plaintiff that the farm he wished to purchase was in good condition and was a top producing farm for Defendant. (*Id.* ¶ 7.) Plaintiff was led to believe that the farm would need no substantial improvements in the near future. (*Id.*)

In 2001, Plaintiff and his family purchased the farm and took over management of the farm's flock of poultry. (*Id.* ¶ 8.) Plaintiff became aware of many problems that poultry growers were having with the Defendant and other poultry integrators, and conducted extensive research into the relationship between poultry integrators and contract growers. *(Id.* ¶ 9.)

In 2002, Plaintiff attended a conference in North Carolina with other contract growers, attorneys representing contract growers, and representatives of farmer organizations, designed to address the problems that growers were having in dealing with the integrators. (*Id.* ¶ 10.) Part of the conference was to provide guidelines on organizing grower associations. (*Id.*) After the conference, Plaintiff became actively

involved with trying to organize growers in his area. (*Id.* ¶ 11.)

In 2004, Plaintiff was elected chairman of the directors for the Tennessee Poultry Growers Association. (*Id.* ¶ 12.) In this position, Plaintiff gathered information from other growers about problems they were having with Defendant and educated other growers about their rights under federal law. (*Id.* ¶¶ 13-14.) Plaintiff repeatedly reported growers' complaints to Brett Offutt at the Office of Policy and Litigation of the Packers and Stockyards Administration in Washington, D.C. (*Id.* ¶ 13.)

During his growing contract with Defendant, Plaintiff became concerned that his poultry was not being weighed upon arrival at the plant, as was required by his contract and by federal law. (*Id.* ¶ 16.) In August and December of 2004, Plaintiff went to the plant to watch his birds being weighed and was denied access. (*Id.* ¶ 17.) He complained about his denial of access to Offutt and asked that a letter be sent to Defendant. (*Id.*)

On February 13, 2005, Plaintiff followed the truck loaded with his poultry to Defendant's plant. (*Id.* ¶ 17.) The truck arrived at the plant at 2:00 a.m. but Plaintiff was told that the birds would not be weighed until after 4:00 a.m. (*Id.*) Plaintiff returned to the plant at 4:00 a.m. and was denied access. (*Id.*) Plaintiff then called Steve Warrilow, an agent with the Grain Inspection Packers and Stockyards Administration, who informed Plaintiff that he was on his way to Defendant's plant and would find out why Plaintiff

was denied access to the weighing of his birds. (*Id.* ¶ 18.)

Later that week, Plaintiff met with Defendant's plant managers. (*Id.* ¶ 18.) Following that meeting, Defendant delayed placement of birds on Plaintiff's farm for a full flock rotation, at a cost to Plaintiff of $30,000.00. (*Id.*) Plaintiff met with Defendant's managers again on March 28, 2005 and was told that Defendant had made a "company decision" not to place birds with Plaintiff after he made the weighing complaint. (*Id.*) Plaintiff asked for compensation for the missed flock but was told that Defendant had decided not to pay Plaintiff. (*Id.* ¶ 19.)

On January 11, 2006, Plaintiff was informed by mail that his contract with Defendant would not be renewed because Plaintiff had failed to make "costly and unnecessary" changes to his poultry operations and because of Plaintiff's confrontational behavior towards Tyson's representatives. (*Id.* ¶¶ 20-21.) At that time, Plaintiff was well above average in the grower rankings and was a successful producer of broiler poultry. (*Id.*) Since Defendant terminated its contract with Plaintiff, Plaintiff has advertised his farm for sale but has been unable to sell due to Defendant's demands for costly upgrades before it would agree to place birds on the farm. (*Id.* ¶ 23.)

On January 7, 2008, Plaintiff filed the instant lawsuit, alleging that Defendant violated the Agricultural Fair Practices Act, 7 U.S.C. § 2301 *et seq.*, by discriminating against Plaintiff based on his membership in an association of producers. (*Id.* ¶¶ 24-27.) Plaintiff also alleges that Defendant violated the Packers and Stockyards Act, 7 U.S.C.

§ 181 *et seq.*, by engaging in unfair, unjustly discriminatory or deceptive practices. (*Id.* ¶¶ 28-30.)

III. ANALYSIS

"[T]o survive a motion to dismiss, the complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." *Eidson v. State of Tennessee Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007). "Conclusory allegations or legal conclusions masquerading as factual allegations will not suffice." *Id.*

A. Agricultural Fair Practices Act of 1967

Defendants move to dismiss Plaintiff's claim under the Agricultural Fair Practices Act ("AFPA") arguing that: (1) Plaintiff's complaint makes no factual allegation that Plaintiff was ever involved with an association of producers; (2) the complaint makes no allegation that Defendant knew that Plaintiff was involved with an association of producers; and (3) any claim prior to January 2006 is barred by the AFPA's two-year statute of limitations. (Court Doc. 11 at 4.)

The AFPA was enacted "to rectify a perceived imbalance in bargaining position between producers and processors" of agricultural products. *Michigan Canners and Freezers Assoc. v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 465 (1984). The Act's principal purpose is to "protect individual producers from interference by processors when deciding whether to belong to a producers' association." *Id.*

To achieve these goals, the AFPA states that "handlers" are prohibited from "coerc[ing] any producer in the exercise of his right to join and belong to or refrain from joining an association of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association." 7 U.S.C. § 2303(a). Handlers are also prohibited from "discriminat[ing] against any producer with respect to price, quantity, quality or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers." 7 U.S.C. § 2303(b). The parties agree that Plaintiff is a producer and Defendant is a handler within the meaning of the statute.

The parties dispute whether the Tennessee Poultry Growers Association ("TGPA") of which Plaintiff was a member and one-time president, is an "association of producers" within the meaning of the AFPA. An "association of producers" is defined as "any association of producers of agricultural products engaged in marketing, bargaining, shipping or processing as defined in section 1141(j) of Title 12, or in section 291 of this title." 7 U.S.C. § 230[illegible](c).

To resolve the parties' dispute over the meaning of "association of producers", the Court must begin "where all such inquiries must begin: with the language of the statute itself." *U.S. v. Ron Pair Enterprises, Inc.*, 489 US. 235, 241 (1989). Where a statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *Id.* (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute

what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Under the principle of *expressio unius est exclusio alterius*, "the mention of one thing implies the exclusion of another", "[w]hen a statute limits a thing to be done to a particular mode, it includes the negative of any other mode." *Millsaps v. Thompson*, 259 F.3d 535, 546 (6th Cir. 2001). Interpreting § 2302(c), the United States Court of Appeals for the Sixth Circuit has held that a state-run potato commission was not an "association of producers" because it did not engage in marketing, bargaining, shipping or processing of agricultural products. *Newark Gardens, Inc. v. Michigan Potato Industry Comm'n*, 847 F.2d 1201, 1206 (6th Cir. 1988).

In his capacity as president of the TPGA, Plaintiff "gathered information from other growers about problems they were having with Tyson" and reported these complaints to government agencies. (Complaint, Court Doc. 1, ¶ 13.) Plaintiff also "educated other growers about federal laws prohibiting abuse of growers in the poultry industry." (*Id.* ¶ 14.) Plaintiff distributed video tapes to other growers that reported problems in the poultry industry. (*Id.* ¶ 15.) From allegations in Plaintiff's complaint, it appears that TPGA is principally involved with educating growers about their rights and assisting growers with enforcing their rights by reporting producers' violations to federal agencies.

Defendant argues that TPGA's "educational and informational efforts and, to the extent that they exist, its government complaints, do not qualify it as an 'association of producers'" under the AFPA. (Court Doc. 11 at 7.) The statutory language is clear that an "association of producers" includes only those

organizations that engage in "marketing, bargaining, shipping or processing"of agricultural products. 7 U.S.C. § 2302(c). The Court must therefore evaluate whether the TPGA is involved with any of the specified activities.

"Marketing" is "the act of buying and selling in a market; the commercial functions involved in transferring goods from producer to consumer." *The American Heritage Dictionary of the English Language* 1072 (4th ed. 2000). No reasonable inference can be drawn from the allegations in the complaint that the TPGA engages in buying or selling of goods in a market or in the commercial functions involved with transferring goods from producer to consumer. The actions of the TPGA do not, therefore, qualify as marketing under § 2302.

"Shipping" is "the act or business of transporting goods." *Id.* at 1607. "Producing" is "to bring forth, yield; to manufacture; to cause to occur or exist; to make or yield products or a product." *Id.* at 1399. No reasonable inference can be drawn from the complaint that the TPGA is involved with shipping or producing agricultural goods under § 2302.

"Bargaining" is "to negotiate the terms of an agreement, as to sell or exchange; to engage in collective bargaining; to arrive at an agreement." *Id.* at 144. There is no allegation that TPGA negotiates on behalf of any of its members or, as discussed above, sells or exchanges agricultural goods. "Collective bargaining" is "negotiation between organized workers and their employer or employers to determine wages, hours, rules, and working conditions." *Id.* at 362. Although it appears that Plaintiff, in his role as

president of TPGA, discussed issues such as working conditions and federal laws with other growers, there is no allegation that he ever discussed those issues with Defendant. Moreover, the relationship between Plaintiff and Defendant is not that of employer/employee but of two commercial organizations under contractual obligations to each other. There is no indication from the allegations in the complaint that TPGA had any interaction with Defendant and could not, therefore, have collectively bargained with Defendant. As such, there is no indication that TPGA engaged in "bargaining," collective or otherwise, with regard to agricultural products as required by § 2302.

The definition of "association of producers" § 2302(c) also cross-references section 12 U.S.C. § 1141(j), a subsection of the Agricultural Marketing Act of 1929, and 7 U.S.C. § 291, a subsection of the Capper-Volstead Act. Both of these statutes exempt agricultural cooperatives from federal antitrust regulation.

The Agricultural Marketing Act ("AMA") "authorizes marketing agreement and marketing orders in order to maintain orderly marketing conditions in interstate commerce for agricultural commodities. Marketing agreements are formal, voluntary agreements between the Secretary of Agriculture and handlers of a particular commodity who have signed the agreement." *Newark Gardens*, 847 F.2d at 1209-10. Section 1141(j) of the AMA provides in relevant part:

> As used in this subchapter, the term "cooperative association" means any association in which farmers act together in processing,

> preparing for market, handling, and/or marketing the farm products of persons so engaged , and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm services.

12 U.S.C. § 1141(j). The TPGA's educational and enforcement actions do not bring it within the meaning of "cooperative association" under the AMA.

The purpose of the Capper-Volstead Act was to exempt agricultural cooperatives from the antitrust laws. *Newark Gardens*, 847 F.2d at 1208. Section 291 of the Capper-Volstead Act states:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have their marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes.

7 U.S.C. § 291. None of the actions of the TPGA involve "processing, preparing for market, handling, [or] marketing in interstate and foreign commerce."

Based on the evidence before the Court, the TPGA does not appear to be the type of organization

envisioned by the Capper-Volstead Act. There is no apparent policy reason that the activities of the TPGA would be subject to antitrust laws and therefore no need to establish an exemption for such activities.

Under the plain language of § 2302(c), in order to qualify as an "association of producers", an organization must be engaged in "marketing, bargaining, shipping or producing" of agricultural goods or must fall within cited provisions of the AMA or the Capper-Volstead Act. The doctrine of *expressio unius est exclusio alterius* precludes the Court from looking beyond the specified activities in determining whether an organization qualifies as an "association of producers". An organization that educates growers about their rights and assists them with enforcing those rights does not qualify as an "association of producers" within the meaning of the AFPA.

Plaintiff argues that he does not need to establish that he was involved with an association of producers in order to state a claim under the AFPA and relies on a federal district court decision out of Georgia to support his claim. (Court Doc. 12 at 8.) Plaintiff's argument ignores, however, *Newark Gardens, Inc. v. Michigan Potato Industry Commission*, 847 F.2d 1201 (6th Cir. 1988), in which the Sixth Circuit held that, because defendant potato cooperative was not an "association of producers", the AFPA did not apply and, therefore, did not preempt state law. The *Newark Gardens* holding implies that in order to sustain a cause of action under the AFPA, at least one party must be affiliated with an "association of producers." *Id.* at 1208. See also *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 637 (10th Cir. 1998), *abrogated on other grounds by Exxon Mobil Corp. v. Allapaffah Servs.*,

Inc., 545 U.S. 546, 552 (2005) ("Since plaintiffs' complaint made no allegation concerning membership in [an association of producers], we affirm the district court's dismissal of plaintiffs' AFPA claim for failure to state a claim.") A published opinion of the United States Court of Appeals for the Sixth Circuit is binding on this Court. Taking all well-pled allegations as true and construing the complaint in the light most favorable to the Plaintiff, the Court finds that Plaintiff has failed to establish that he was involved with an "association of producers" within the meaning of § 2302(c).

Accordingly, Defendant's Motion to Dismiss [Court Doc. 10] is **GRANTED** as to Plaintiff's claim under the AFPA. Plaintiff's claim under the AFPA is **DISMISSED WITH PREJUDICE**.

B. Attorney's Fees Incurred in Defending Against Plaintiff's Claims under the AFPA.

Defendants have asked the Court to award it the attorney's fees incurred in defending against Plaintiff's AFPA claim. (Court Doc. 11 at 11-12.) The AFPA allows a court to award attorney's fees to the prevailing party in an action brought pursuant to its terms. 7 U.S.C. § 2305(c).

Where a plaintiff's claims are dismissed on defendant's motion, defendant is the prevailing party. *Jefferson v. Jefferson County Public School System*, 360 F.3d 583, 591 (6th Cir. 2004). As discussed above, the Court has dismissed Plaintiff's claim under the AFPA for failure to state a claim upon which relief could be granted. Accordingly, Defendant is the

prevailing party with respect to this claim and, pursuant to 7 U.S.C. § 2305(c), is entitled to its attorney's fees incurred in defending against Plaintiff's AFPA claim.

C. Packers and Stockyards Act ("PSA")

Plaintiff claims that Defendant "engag[ed] in unfair, unjustly discriminatory, or deceptive practices or devises in violation of § 202 of the Packers & Stockyards Act, 7 U.S.C. § 192(a); and by subjecting Plaintiff to undue or unreasonable prejudice or disadvantage in violation of 7 U.S.C. § 192(b)." (Court Doc. 1 ¶ 29.) Defendant argues for dismissal of these claims, stating that the PSA is an antitrust statute and Plaintiff has failed to allege any anticompetitive activity by Defendant. (Court Doc. 11 at 13-14.) Defendant also contends that Plaintiff has failed to claim any anticompetitive injuries. (*Id.* at 17.)

Section 202(a) of the PSA makes it unlawful for a live poultry dealer to "[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device." 7 U.S.C. § 192(a). Section 202(b) makes it unlawful for a live poultry dealer to "[m]ake or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 7 U.S.C. § 192(b).

"As in all cases of statutory construction, [the court's] task is to interpret the words of the statute in light of the purposes Congress sought to serve." *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 36 (1983). "The

primary purpose of the PSA was to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry." *London v. Fielddale Farms Corp.*, 410 F.3d 1295, 1302 (11th Cir. 2005) (citing PSA's legislative history). At the time the PSA was enacted, Congress was concerned with the potential for a monopoly of packers, and the Act "was aimed at halting a general course of action for the purpose of destroying competition." *Armour & Co. v. United States*, 402 F.2d 712, 720 (7th Cir. 1968) (internal citation and quotation omitted). The statute does not define what constitutes "unfair, unjustly discriminatory, or deceptive practice[s] or device[s]," nor has the Sixth Circuit addressed the meaning of these terms within the context of § 202. The Court must therefore interpret § 202(a) and § 202(b) in light of Congress's purpose in enacting the PSA. *Norfolk Redevelopment*, 464 U.S. at 36. Given the PSA's antitrust roots, several circuit courts have held that an unfair, discriminatory or deceptive act must have an anticompetitive effect in order to sustain a cause of action under § 202. *See Armour*, 402 F.2d at 717 (section 202(a) claim fails "absent some predatory intent or some likelihood of competitive injury"); *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007) ("We therefore join those circuits requiring a plaintiff who challenges a practice under § 202(a) to show that the practice injures or is likely to injure competition."); *London*, 410 F.3d at 1302 ("We join those circuits that hold that in order to succeed on a claim under the PSA, a plaintiff must show that the defendant's unfair, discriminatory or deceptive practice adversely affects or is likely to adversely affect competition."); *Philson v. Goldsboro*, 1998 WL 709324, *4 (4th Cir. Oct. 5, 1998) (plaintiffs "were required to prove that the defendants' conduct was likely to affect

competition adversely in order to prevail on their claims under [the PSA]."

Plaintiff claims there is a split in the circuits as to this issue because the Ninth Circuit has held that no showing of anticompetitive effect is necessary under the PSA. In support of this contention, Plaintiff cites *Spencer Livestock Comm'n Co. v. Dep't of Agriculture*, 841 F.2d 1451,1455 (9th Cir. 1988). (Court Doc. 12 at 18-19.) The court in *Spencer*, however, was not interpreting § 202, but instead § 312(a) of the PSA, which regulates the activities of stockyard owners, market agencies and dealers. *Spencer*, 841 F.2d at 1453. In a case involving § 202, the Ninth Circuit held that "unfair practices under § 202 are not confined to those where competitive injury has already resulted, but includes those where there is a reasonable likelihood that the purpose will be achieved and that result will be an undue restraint of competition." *De Jong Packing Co. v. Dep't of Agriculture*, 618 F.2d 1329, 1331 (9th Cir. 1980). In *Spencer*, the Ninth Circuit did not purport to overrule *De Jong* or even to distinguish *Spencer* from *De Jong*. *De Jong* is the Ninth Circuit's most recent decision interpreting § 202. It therefore appears that the Ninth Circuit has held, consistent with the majority of other circuits, that § 202 requires a showing that defendant's actions had an anticompetitive effect.

Policy considerations also support the majority view that § 202 requires a showing of an anticompetitive effect. "Eliminating the competitive impact requirement would ignore the long-time antitrust policies which formed the backbone of the PSA's creation. Failure to require a competitive impact showing would subject dealers to liability under the

PSA for simple breach of contract or for justifiably terminating a contract with a grower who has failed to perform as promised." *London*, 410 F.3d at 1304.

In the absence of Sixth Circuit precedent on an issue, the Court may look for guidance in the case law from other federal circuits. *See NBBJ East Ltd. Partnership v. NBBJ Training Academy*, 201 F. Supp. 2d 800, 805 (S.D. Ohio 2001) (citing a Second Circuit decision on a question of law that the Sixth Circuit had not yet addressed); *Akers v. Bonifasi*, 629 F. Supp. 1212, 1222 (where neither the United States Supreme Court nor the Sixth Circuit had weighed in on an issue, the district court followed a "well-reasoned" opinion by the Fifth Circuit). In this case, the Court will follow the majority of the circuit courts which have addressed the issue in holding that § 202 requires a showing of anticompetitive effect in order to sustain a cause of action. The Court will thus examine Plaintiff's claim to determine whether he has asserted facts showing that Defendant's actions affected or were likely to affect competition.

Plaintiff asserts a number of wrongful acts by Defendant: denying him access to the scales while weighing his poultry (complaint ¶ 17), delaying placement of a flock of birds (*id.* ¶ 18), and terminating his grower's contract (*id.* ¶ 20). Plaintiff alleges that these acts were designed to thwart his efforts to organize growers and taken in retaliation for his complaints to the Packers & Stockyards Administration. (*Id.* ¶ 22.) Plaintiff claims monetary damages for the missed flock (*id.* ¶ 18) and claims that he has been unable to sell his farm due to Defendant's actions. (*Id.* ¶ 23.)

Plaintiff's complaint does not allege that Defendant's actions had an anticompetitive effect. Plaintiff focuses solely on how Defendant's action harmed him as an individual grower. He makes no allegations regarding the effect of Defendant's actions on the pricing of poultry or on overall competition in the poultry industry. *See London*, 410 F.3d at 1305 (listing possible evidence that plaintiff could have offered in support of claim of anticompetitive injury).

Plaintiff has therefore failed to assert that Defendant's wrongful actions affected or were likely to affect competition. Accordingly, his claims under the PSA must be dismissed for failure to state a claim upon which relief could be granted. *Eidson v. State of Tennessee Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007) ("[T]o survive a motion to dismiss, the complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory.") *See also Mims v. Cagle Foods JV, LLC*,148 Fed. App'x 762, 766 (11th Cir. 2005) ("Termination of a contract without economic justification is insufficient to sustain a claim under the PSA absent a showing of anticompetitive effect .")

Accordingly, Defendant's Motion to Dismiss [Court Doc. 10] is **GRANTED** with respect to Plaintiff's claim under the Packers and Stockyards Act. Plaintiff's claim under the Packers and Stockyards Acts is **DISMISSED WITH PREJUDICE**.

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss [Court Doc. 10] is **GRANTED**. Plaintiff's claims are **DISMISSED WITH PREJUDICE**. Pursuant to 7 U.S.C. § 2305(c), Defendant **SHALL RECOVER** its attorney's fees incurred in defending against Plaintiff's claim under the Agricultural Fair Practices Act. In accordance with Rule 54(d)(2) of the Federal Rules of Civil Procedure, Defendant **SHALL FILE** a separate motion with supporting documentation outlining its attorney's fees no later than fourteen days after the entry of judgment in this case. Costs are taxed against the Plaintiff pursuant to Rule 54(d)(1). The Clerk shall close the case.

SO ORDERED this 9th day of April, 2008.

/s/ Harry S. Mattice, Jr.
HARRY S. MATTICE, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at WINCHESTER

Case No. 4:08-cv-3
Judge Mattice

ALTON T. TERRY,	)
	)
Plaintiff,	)
	)
v.	)
	)
TYSON FARMS, INC.,	)
	)
Defendant.	)
	)

JUDGMENT

This case came before the Court on the Motion to Dismiss by Defendant Tyson Farms, Inc. The Honorable Harry S. Mattice, United States District Judge, having rendered a decision on the Defendant's motion.

It is **ORDERED** and **ADJUDGED:**

that the plaintiff Alton T. Terry, take nothing, that the action be **DISMISSED WITH PREJUDICE**. Costs shall be taxed against the Plaintiff.

Dated at *Chattanooga, Tennessee*, this 9th day of April, 2008.

/s/ Patricia L. McNutt
PATRICIA L. McNUTT
CLERK OF COURT

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-5577

[Filed June 23, 2010]

ALTON T. TERRY,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
TYSON FARMS, INC.,	)
	)
Defendants-Appellee.	)
	)

BEFORE: NORRIS, COOK, and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX D

Statute Sections

7 U.S.C. § 181 et seq. (2006):

§ 182. Definitions

(6) The term "poultry" means chickens, turkeys, ducks, geese, and other domestic fowl;

(7) The term "poultry product" means any product or byproduct of the business of slaughtering poultry and processing poultry after slaughter;

(8) The term "poultry grower" means any person engaged in the business of raising and caring for live poultry for slaughter by another, whether the poultry is owned by such person or by another, but not an employee of the owner of such poultry;

(9) The term "poultry growing arrangement" means any growout contract, marketing agreement, or other arrangement under which a poultry grower raises and cares for live poultry for delivery, in accord with another's instructions, for slaughter;

(10) The term "live poultry dealer" means any person engaged in the business of obtaining live poultry by purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter by another, if poultry is obtained by such person in commerce, or if poultry obtained by such

person is sold or shipped in commerce, or if poultry products from poultry obtained by such person are sold or shipped in commerce; and

§ 192. Unlawful practices enumerated

It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or

(c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person

(1) to apportion territory for carrying on business, or
(2) to apportion purchases or sales of any article, or
(3) to manipulate or control prices; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.

§ 208. Unreasonable or discriminatory practices generally; rights of stockyard owner of management and regulation

(a) It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

(b) It shall be the responsibility and right of every stockyard owner to manage and regulate his stockyard in a just, reasonable, and nondiscriminatory manner, to prescribe rules and regulations and to require those persons engaging in or attempting to engage in the

purchase, sale, or solicitation of livestock at such stockyard to conduct their operations in a manner which will foster, preserve, or insure an efficient, competitive public market. Such rules and regulations shall not prevent a registered market agency or dealer from rendering service on other markets or in occasional and incidental off-market transactions.

§ 209. Liability to individuals for violations; enforcement generally

(a) If any person subject to this chapter violates any of the provisions of this chapter, or of any order of the Secretary under this chapter, relating to the purchase, sale, or handling of livestock, the purchase or sale of poultry, or relating to any poultry growing arrangement or swine production contract, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either

(1) by complaint to the Secretary as provided in section 210 of this title, or

(2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

§ 213. Prevention of unfair, discriminatory, or deceptive practices

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subsection (a) of this section, the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty by an action in the appropriate district court of the United States.

§ 228b–1. Final date for making payment to cash seller or poultry grower

(a) Delivery of full amount due

Each live poultry dealer obtaining live poultry by purchase in a cash sale shall, before the close of the next business day following the purchase of poultry, and each live poultry dealer obtaining live poultry under a poultry growing arrangement shall, before the close of the fifteenth day following the week in which the poultry is slaughtered, deliver, to the cash seller or poultry grower from whom such live poultry dealer obtains the poultry, the full amount due to such cash seller or poultry grower on account of such poultry.

(b) Delay or attempt to delay collection of funds as "unfair practice"

Any delay or attempt to delay, by a live poultry dealer which is a party to any such transaction, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for poultry obtained by poultry growing arrangement or purchased in a cash sale, shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

(c) Definition of cash sale

For the purpose of this section, a cash sale means a sale in which the seller does not expressly extend credit to the buyer.

§ 228b–2. Violations by live poultry dealers

(a) Written complaint by Secretary; hearing; intervention; amended complaint

Whenever the Secretary has reason to believe that any live poultry dealer has violated or is violating any provision of section 197 of this title or section 228b–1 of this title, he shall cause a complaint in writing to be served upon the live poultry dealer, stating his charges in that respect, and requiring the live poultry dealer to attend and testify at a hearing at a time and place designated therein, at least 30 days after the service of such complaint; and at such time and place there shall be afforded the live poultry dealer a reasonable opportunity to be informed as to the evidence introduced against him (including the right of cross-examination), and to be heard in person or by counsel and through witnesses, under such regulations as the Secretary may prescribe. Any person for good cause shown may, on application, be allowed by the Secretary to intervene in such proceeding, and appear in person or by counsel. At any time prior to the close of the hearing, the Secretary may amend the complaint; but in case of any amendment adding new charges, the hearing shall, on the request of the live poultry dealer, be adjourned for a period not exceeding 15 days.

(b) Report on findings of fact by Secretary; cease and desist order; assessment of civil penalty; action by Attorney General upon live poultry dealer's failure to pay penalty

If, after such hearing, the Secretary finds that the live poultry dealer has violated, or is violating, any

provisions of section 197 of this title or section 228b–1 of this title covered by the charges, he shall make a report in writing in which he shall state his findings as to the facts, and shall issue and cause to be served on the live poultry dealer an order requiring such live poultry dealer to cease and desist from continuing such violation. The testimony taken at the hearing shall be reduced to writing and filed in the records of the Department of Agriculture. The Secretary may also assess a civil penalty of not more than $20,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business: Provided, however, That in no event can the penalty assessed by the Secretary take priority over or impede the ability of the live poultry dealer to pay any unpaid cash seller or poultry grower. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General, who may recover such penalty by an action in the appropriate District Court of the United States.

(c) Amendment or setting aside of report or order

Until the record in such hearing has been filed in a court of appeals of the United States, as provided in section 228b–3 of this title, the Secretary, at any time, upon such notice and in such manner as he deems proper, but only after reasonable opportunity to the live poultry dealer to be heard, may amend or set aside the report or order, in whole or in part.

(d) Service of complaints, orders, and other processes

Complaints, orders, and other processes of the Secretary under this section may be served in the same manner as provided in section 45 of title 15.

§ 228b–4. Violation of final order by live poultry dealer; penalty

Any live poultry dealer, or any officer, director, agent, or employee of a live poultry dealer, who fails to obey any order of the Secretary issued under the provisions of section 228b–2 of this title, or such order as modified--

(1) after the expiration of the time allowed for filing a petition in the court of appeals to set aside or modify such order, if no such petition has been filed within such time;

(2) after the expiration of the time allowed for applying for a writ of certiorari, if such order, or such order as modified, has been sustained by the court of appeals and no such writ has been applied for within such time; or

(3) after such order, or such order as modified, has been sustained by the courts as provided in section 228b–3 of this title;

shall on conviction be fined not less than $1,000 nor more than $20,000. Each day during which such failure continues shall be deemed a separate offense.

7 U.S.C. § 197b (Supp. II 2008). Choice of law and venue

(a) Location of forum

The forum for resolving any dispute among the parties to a poultry growing arrangement or swine production or marketing contract that arises out of the arrangement or contract shall be located in the Federal judicial district in which the principle part of the performance takes place under the arrangement or contract.

(b) Choice of law

A poultry growing arrangement or swine production or marketing contract may specify which State's law is to apply to issues governed by State law in any dispute arising out of the arrangement or contract, except to the extent that doing so is prohibited by the law of the State in which the principal part of the performance takes place under the arrangement or contract.

List of Amendments to 1921 PSA

United States Department of Agriculture

Grain Inspection, Packers and Stockyards Administration

Packers and Stockyards Program

Packers and Stockyards Act, 1921, enacted August 15, 1921 (42 Stat. 159) and amended and supplemented by the following acts of Congress:

May 5, 1926 (44 Stat. 397)
June 7, 1934 (48 Stat. 926)
August 14, 1935 (49 Stat. 648)
August 10, 1939 (53 Stat. 1351)
June 19, 1942 (56 Stat. 372)
July 12, 1943 (57 Stat. 422)
June 25, 1948 (62 Stat. 909 and 991)
May 24, 1949 (63 Stat. 107)
August 28, 1958 (72 Stat. 944, Pub. L. 85-791)
September 2, 1958 (72 Stat. 1749, Pub. L. 85-909)
July 8, 1963 (77 Stat. 79)
July 31, 1968 (82 Stat. 474, Pub. L. 90-446)
September 13, 1976 (90 Stat. 1249, Pub. L. 94-410)
October 2, 1978 (92 Stat. 886, Pub. L. 95-409)
November 23, 1987 (101 Stat. 917, Pub. L. 100-173)
October 13, 1994 (108 Stat. 3178, Pub. L. 103-354)
October 22, 1999 (113 Stat. 1210, Pub. L. 106-78)
November 9, 2000 (114 Stat. 2077, Pub. L. 106-472)
May 13, 2002 (116 Stat. 134, Pub. L. 107-171)
November 2, 2002 (116 Stat. 1921, Pub. L. 107-273)
December 3, 2004 (118 Stat. 2635, Pub. L. 108-444)
October 5, 2006 (120 Stat. 1464, Pub. L. 109-296)
June 18, 2008 (122 Stat. 1651, Pub. L. 110-246)

NOTE: Congress directed agencies to update the civil penalties every 4 years.
Effective September 2, 1997, 7 CFR 3.91, amended the civil penalties, as required by Pub. L. 101-410 and 104-134. (Updated as of May 7, 2010).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

CIVIL ACTION
FILE NO. 4:08-cv-3
Mattice/[ ]

JURY TRIAL DEMANDED

[Filed January 7, 2008]

ALTON T. TERRY,	)
	)
Plaintiff,	)
	)
v.	)
	)
TYSON FARMS, INC.,	)
	)
Defendant.	)
	)

COMPLAINT

Comes now, **ALTON T. TERRY**, Plaintiff herein, and files his Complaint against **TYSON FARMS, INC.**, Defendant herein, by showing to this Court as follows:

I.

PARTIES

1. Plaintiff, **ALTON T. TERRY**, is a resident of Moore County, Tennessee. Plaintiff was formerly engaged in the business of raising broiler poultry under a poultry growing arrangement with Defendant, **TYSON FARMS, INC.**

2. Defendant, **TYSON FARMS, INC.**, (hereinafter "Tyson") is engaged in the business of selling processed poultry products in interstate commerce. Defendant is incorporated in the State of North Carolina, and has its principal place of business in Springdale, Arkansas. Defendant maintains an office and transacts business in Bedford County, Tennessee.

II.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this matter because Plaintiff's claims arise under the Unfair Trade Practices Effecting Producers of Agricultural Products Act ("Agricultural Fair Practices Act of 1967"), 7 U.S.C. § 2301, et seq., and under the Packers & Stockyards Act of 1921, as amended by Section 5 of the Poultry Producers' Financial Protection Act of 1987, 7 U.S.C. § 209.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391, as the claims of the Plaintiff arose within this district, and the Defendant is a corporation presently doing business within this district.

III.

FACTUAL ALLEGATIONS

5. In 2000, Plaintiff became interested in purchasing a poultry farm, which included a residence, five poultry houses and other outbuildings, and 12.64 acres.

6. Before purchasing the farm, Plaintiff did extensive research on the poultry business and the law governing poultry companies. Plaintiff also looked at the seller's production records and spoke with Mr. Mike Brown, production manager at Tyson's Shelbyville complex, about the company's intent to continue placement of birds.

7. Mr. Brown assured Plaintiff that the farm was in good condition, and was a top producing farm. Mr. Brown also assured Plaintiff that the facility and equipment were in excellent condition and suitable for growing chickens. Plaintiff was led to believe by Mr. Brown that the farm Plaintiff was purchasing would need no substantial improvements in the near future.

8. In the summer of 2001, Plaintiff, his three children, and his wife moved into the residence, and Plaintiff took over management of the flock then on the farm.

9. After Plaintiff started growing chickens, he became aware of many problems growers were having with Tyson and other poultry integrators. Plaintiff began doing extensive research to better understand the nature of the relationship between poultry integrators and contract growers.

10. In 2002, Plaintiff attended a conference in North Carolina with other contract growers, attorneys representing growers, and representatives of farmer organizations. The purpose of the conference was to address problems growers were facing in their dealings with companies, and to provide guidelines on organizing grower associations.

11. After attending the meeting in North Carolina, Plaintiff became actively involved in trying to organize poultry growers in his area. Plaintiff also provided input to state regulators and legislators concerning confined animal feeding operations (CAFO regulations).

12. In 2003 and 2004, Plaintiff organized and attended several meetings of poultry growers in his area. In September of 2004, Plaintiff was elected as chairman of the directors for the Tennessee Poultry Growers Association.

13. As an officer in the Poultry Growers Association, Plaintiff gathered information from other growers about problems they were having with Tyson. Plaintiff repeatedly reported these complaints to Brett Offut, Office of Policy & Litigation with the Packers & Stockyards Administration in Washington, D.C.

14. As an officer in the Poultry Growers Association, Plaintiff also educated other growers about federal laws prohibiting abuse of growers in the poultry industry.

15. At the meeting Plaintiff attended in North Carolina, Plaintiff was provided four tapes of various broadcasts reporting on problems in the poultry

industry. Plaintiff took the tapes, consolidated the broadcasts into one tape, and had multiple copies made to give to growers in his complex.

16. While growing chickens for Tyson, Plaintiff became concerned that his poultry was not being weighed upon arrival at the plant as required by his contract and federal regulations.

17. Plaintiff attempted to watch his birds being weighed on several occasions. In August of 2004 and December of 2004, Plaintiff went to the plant and was denied access. He complained to Brett Ofutt at the Office of Policy & Litigation in Washington, D.C. and asked that a letter be sent out to Tyson Foods, Inc. On February 13, 2005, Plaintiff followed the truck loaded with birds from his farm to the processing plant. When he arrived at the plant at 2:00 a.m., he was told that his birds would not be weighed until after 4:00 a.m. when the "yard dog" came in. When Plaintiff returned at 4:00 a.m., he was once again denied access to the plant.

18. Plaintiff called Steve Warrilow, an agent with the Grain Inspection Packers & Stockyards Administration. Mr. Warrilow told Plaintiff that he was in route to the plant and would find out why Plaintiff was denied access to observe the weighing of his birds. Later that week, Plaintiff met with Tyson managers, Mark Harmon, Michael Sheets, and Rick Curtis. Following that meeting, the company delayed placement of birds for a full flock rotation, costing Plaintiff $30,000.00 in lost compensation. When Plaintiff met with company managers, Mark Harmon, Chip Miller, and Michael Sheets on March 28, 2005, he

was told that it was "a company decision" not to place birds after Plaintiff made the weighing complaint.

19. Plaintiff asked for compensation for the damages he lost as a result of the missed flock, and was told by Mark Harmon, Michael Sheets, and the regional manager, that the company had decided that they were not going to pay Plaintiff for the missed flock.

20. On January 11, 2006, Plaintiff was notified by mail that his contract would not be renewed. At the time Tyson informed Plaintiff that the company would not continue placement of birds on his farm, Plaintiff was well above average in the grower rankings, and was a successful producer of broiler poultry.

21. The reasons given by Tyson for termination of Plaintiff's contract were that Plaintiff had failed to make costly and unnecessary changes to his poultry operating, and Plaintiff's alleged "confrontational" behavior toward Tyson representatives.

22. The reasons provided by Tyson for termination of Plaintiff's contract were false and pretextual to disguise Tyson's real reason, which was to thwart Plaintiff's efforts to organize growers, and in retaliation for Plaintiff's complaints to the Packers & Stockyards Administration.

23. Since termination of Plaintiff's contract on January 11, 2006, Plaintiff has had the farm advertised for sale, but has been unable to sell the farm due to Tyson's demands for costly upgrades before agreeing to place birds.

COUNT ONE

AGRICULTURAL FAIR PRACTICES ACT

24. Plaintiff hereby realleges and incorporates paragraphs one (1) through twenty-five (25) above as if set out verbatim hereunder.

25. Plaintiff is a producer, pursuant to 7 U.S.C. § 2302(b), and Defendant is a handler, within the meaning of § 2302(a) of the Agricultural Fair Practices Act.

26. Defendant violated 7 U.S.C. § 2303 in knowingly permitting its employee or agent to coerce and intimidate Plaintiff in the exercise of his right to join and belong to an association of producers and by discriminating against Plaintiff with respect to the quantity and quality of poultry and feed supplied to Plaintiff because of his membership in an association of producers. Plaintiff was injured in his business and property by reason of Defendant's violation.

27. As a result of Defendant's violation of 7 U.S.C. § 2303, Plaintiff is entitled to damages, including reasonable attorney's fees pursuant to 7 U.S.C. § 2305(c).

COUNT TWO

PACKERS & STOCKYARDS ACT

28. Plaintiff realleges and incorporates paragraphs one (1) through twenty-seven (27) above as if set out verbatim hereunder.

29. Defendant violated the Packers & Stockyards Act, 7 U.S.C. § 181 et seq., by engaging in unfair, unjustly discriminatory, or deceptive practices or devises in violation of § 202 of the Packers & Stockyards Act, 7 U.S.C. § 192(a); and by subjecting Plaintiff to undue or unreasonable prejudice or disadvantage in violation of 7 U.S.C. § 192(b).

30. Each of the above violations of the Packers & Stockyards Act entitles Plaintiff to damages pursuant to 7 U.S.C. § 209.

WHEREFORE, Plaintiff prays for relief and judgment against the Defendant follows:

(a) That Plaintiff have judgment against Defendant in the total amount of all damages suffered by Plaintiff as a result of Defendant's violation of the Agricultural Fair Practices Act, 7 U.S.C. § 2301 et seq.;

(b) That Plaintiff have judgment against Defendant for all damages allowed under the Packers & Stockyards Act, 7 U.S.C. § 209;

(c) That Plaintiff have judgment against Defendant for all costs and reasonable attorney's fees;

(d) That Plaintiff be awarded pre-judgment interest; and

(e) That Plaintiff have such other and further relief as this Court deems proper.

Respectfully submitted this 3rd day of January, 2008.

JOHNSON LAW, P.C.

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